



February 8, 2019

Ann E. Misback
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue NW
Washington, DC 20551

RE: Availability of Funds and Collection of Checks (Regulation CC); Docket No. R-1637; RIN 7100 AF-28

Dear Ms. Misback,

The Credit Union Association of the Dakotas (CUAD), which represents state and federally chartered credit unions in the states of North Dakota and South Dakota, appreciates the opportunity to provide comment to the Board of Governors of the Federal Reserve System (Board) and Consumer Financial Protection Bureau (CFPB) regarding its proposed rulemaking concerning availability of funds and collection of checks (regulation CC).

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) added section 607(f) to the Expedited Funds Availability (EFA) Act and provides that the dollar amounts under the EFA Act shall be adjusted every five years after December 31, 2011, by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W), as published by the Bureau of Labor Statistics, rounded to the nearest multiple of \$25.

EFA Act section 607(f) is proposed to be reflected in Regulation CC as new § 229.11 and accompanying commentary to implement the CPI-W index calculation method. As explained in the discussion of the proposed rule by the CFPB and Board, "If the proposed adjustment methodology is finalized, the adjusted amounts, based on the change in CPI-W from 222.686 in July 2011 to 246.155 in July 2018, would impact the following provisions of Regulation CC and be as follows:

- "The minimum amount in § 229.10(c)(1)(vii) would be adjusted to \$225, as the change of \$21.00 results in a rounding to the nearest multiple of \$25;
- The cash withdrawal amount in § 229.12(d) of \$400 would be adjusted to \$450, as the change of \$42.00 results in a rounding to the nearest multiple of \$25;

2005 North Kavaney Dr. • Bismarck, ND 58501
1741 S. Cleveland Avenue, Suite 304 • Sioux Falls, SD 57103
800.279.6328 • www.cuad.coop



- The new-account amount of \$5,000 in § 229.13(a), the large-deposit threshold of \$5,000 in § 229.13(b), and the repeatedly overdrawn threshold of \$5,000 in § 229.13(d) would each be adjusted to \$5,525, as the change of \$525 results in a rounding to the nearest multiple of \$25; and
- In § 229.21(a) the civil liability amount of \$100 would remain the same, as the change of \$10.50 does not result in a rounding to \$25, while the other civil liability amounts of \$1,000 and \$500,000 would be adjusted to \$1,100 and \$552,500, as the changes of \$105 and \$52,500, respectively, result in a rounding to the nearest multiple of \$25.” 83 FR 64333

The proposed rule would also remove \$100 wherever it appears and replace with \$225, in §§ 229.10, 229.12, 229.13, and the accompanying commentary. The CFPB and Board anticipate publishing the first set of adjustments as a final rule in the first quarter of 2019. This first set of adjustments is proposed to have an effective date of April 1, 2020. A second set of adjustments is anticipated to be published in the first quarter of 2024, with an effective date of April 1, 2025.

These potential increases will require credit unions to update notices/disclosures as well as update software every five years. Under the proposed calculation methodology, the dollar amount adjustments would always be zero or positive. CUAD has concerns regarding the ongoing cost these adjustments will have on credit unions, especially small credit unions, that are at the mercy of form and software vendors to implement these adjustments every five years. CUAD appreciates the CFPB and Board’s role in implementation of the Dodd-Frank Act and realize that it is statutory requirement to adjust the dollar amounts in the EFA Act every five years. However, CUAD encourages the Board and CFPB to look for ways to mitigate cost impact, especially on small financial institutions, when it comes to revised notices relating to potential adjusted dollar amount. CUAD recommends where-ever possible, notices refer to phrase such as, “minimum amount required by regulation,” rather than a specific dollar amount that has to be potentially updated every five years. This is especially true for lobby notices that are generally professional acrylic signage.

The Board is also reopening the comment period for the 2011 Funds Availability Proposal that was issued March 25, 2011. “The Agencies recognize there may have been important changes in markets, technology, or industry practice since the public submitted comments seven years ago in response to the Board’s 2011 Funds Availability Proposal. The Board and the Bureau therefore are now reopening the comment period in order to provide an opportunity for the public to provide comments with new, additional, or different views on the 2011 Funds Availability Proposal.” 83 FR 63437

In the 2011 proposal the Board suggested that with regard to section 229.12(d), Deposits at Nonproprietary ATMs, reducing the maximum hold period from 5 business days to 4 business days is sufficient. Speculating that, “four business days will provide the depository bank with



reasonable opportunity to learn of the nonpayment of a check deposited at a nonproprietary ATM before it must make the funds available for withdrawal.” 76 FR 16869

Furthermore, section 229.13(h)(4) “provides that a reasonable period for a hold extension is one business day (for a total of two) for a deposit of on-us checks, five business days (for a total of seven) for local checks, and six business days (for a total of eleven) for deposits into nonproprietary ATMs. The Board proposes that the safe harbor for the reasonable hold extension for a deposit of on-us checks remain one business day, and that safe harbor for the reasonable hold extension for other checks be reduced to two business days (from five or six business days), for a total of four business days for all other checks.” 76 FR 16870

CUAD is adamantly opposed to any reduction in hold times. Credit unions repeatedly are faced with fraudulent checks that are not being returned within the unrealistic timeframes of regulation CC, even in this modern day of electronic channels.

The Federal Trade Commission (FTC) has written several consumer education pieces on the rise of fraudulent checks. In her September 5, 2018, article, Anatomy of a fake check scam, Colleen Tressler, Consumer Education Specialist, FTC, writes, “The Federal Trade Commission receives tens of thousands of reports each year about fake checks. Over the last three years, the number of complaints has steadily increased, and so have the dollars lost.” <https://www.consumer.ftc.gov/blog/2018/09/anatomy-fake-check-scam>

The FTC developed an infographic with the American Bankers Association Foundation as a way to educate consumers regarding this growing fraud and the fact that financial institutions have to make the funds deposited available instead of protecting consumers by waiting until the check clears. As stated on the FTC infographic, which can be found here, <https://www.consumer.ftc.gov/articles/fake-check-scams-infographic> “banks have to make deposited funds available quickly. It’s the law. But the bank may not learn for days that the check was bad. By then, the scammer has your money. And you have to repay the bank. Remember – just because the check has cleared does not mean it is good.”

On March 17, 2017, Lisa Lake, Consumer Education Specialist, FTC, wrote Don't bank on that check. Her sound advice for consumers reiterated the conflict between the unrealistic check holds of Regulation CC when it comes to fraudulent checks is that, “Banks must make funds from deposited checks available within days, but uncovering a fake check can take them weeks. If a check you deposit bounces – even after it seemed to clear – you’re responsible for repaying the bank. Money orders and cashier’s checks can be counterfeited, too.”

The FTC provides consumers more information on fake checks, which can be found here <https://www.consumer.ftc.gov/articles/0159-fake-checks>. Specifically on the topic “You and Your



Bank — Who is Responsible for What?” the FTC clearly explains, “Under federal law, banks generally must make funds available to you from U.S. Treasury checks, most other governmental checks, and official bank checks (cashier’s checks, certified checks, and teller’s checks), a business day after you deposit the check. For other checks, banks must make the first \$200 available the day after you deposit the check, and the remaining funds must be made available on the second business day after the deposit. However, just because funds are available on a check you’ve deposited doesn’t mean the check is good. It’s best not to rely on money from any type of check (cashier, business or personal check, or money order) unless you know and trust the person you’re dealing with or, better yet — until the bank confirms that the check has cleared. Forgeries can take weeks to be discovered and untangled. The bottom line is that until the bank confirms that the funds from the check have been deposited into your account, you are responsible for any funds you withdraw against that check.”

Scammers are good at what they do and are knowledgeable about rules, such as Regulation CC, and are using it to their advantage to scam people out of their funds. It is CUAD’s position that the regulatory hold time for deposited checks should be longer and we are therefore opposed to the Board proposal to shorten any hold times. Furthermore, CUAD would encourage the Board to provide financial institutions more flexibility in terms of protecting their customers from potentially fraudulent checks by extending options for holds on suspicious checks.

Thank you for this opportunity to share our comments and concerns.

Respectfully,

A handwritten signature in black ink that reads "Jeffrey Olson".

Jeffrey Olson
CEO/President

A handwritten signature in black ink that reads "Amy Kleinschmit".

Amy Kleinschmit
Chief Compliance Officer